85-812

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

No.

GEORGE N. VANTERPOOL
AND MARJORIE VANTERPOOL,

Petitioners,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

When a United States District Court, the highest court in an insular territory, renders an opinion interpreting a territorial statute on a local matter, should the appropriate standard of review on appeal be simply whether the district court erred in formulating or applying a legal precept, *Saludes v. Ramos*, 774 F.2d 992 (3d Cir. 1984), or rather should the appellate court apply the more deferential clear or "manifest error" standard. *Sancho v. Texas Company*, 308 U.S. 349 (1940); *Laguna v. Guam Visitors Bureau*, 725 F.2d 519 (9th Cir. 1984).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

George N. Vanterpool and Marjorie Vanterpool, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered herein on June 28, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 766 F.2d 117 (3d Cir. 1985) and is printed in Appendix "A" hereto, infra. The prior opinion of the United States District Court of the Virgin Islands, Division of St. Croix, is reported at 589 F. Supp. 334 (D.C.V.I. 1984) and is printed in Appendix "B" hereto, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit (attached hereto as Appendix "C") was entered on June 28, 1985. A timely petition for rehearsing was denied on August 12, 1985 (Appendix "D"). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The exclusivity provision of the Virgin Islands' Workmen's Compensation Act, Title 24 V.I.C. Section 284, of the V.I. Code Annoted, provides:

> Section 284. Exclusiveness of remedy
>
> When an employer is insured under this chapter, the right herein established to obtain

compensation shall be the only remedy against the employer: but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist. – Amended June 15, 1961. N. 762. Sess. L. 1961. p. 109.

STATEMENT OF THE CASE

Petitioners, George N. Vanterpool and Marjorie Vanterpool, his wife, filed their original complaint seeking damages for personal injuries in the United States District Court of the Virgin Islands on November 16, 1983. The Vanterpool's complaint alleged that at the time Mr. Vanterpool sustained his disabling injuries he had been a business invite upon the premises of Hess Oil Virgin Islands Corporation, pursuant to and within the scope of his employment with Litwin Panamerican Corporation.

Following his injuries, Mr. Vanterpool sought and received workmen's compensation benefits from the Government Insurance Fund through his employer, Litwin, via the mandatory provisions of the Virgin Islands Workmen's Compensation Act, 24 V.I.C. Section 251, *et. seq.*

The statutory scheme set up by the Virgin Islands Workmen's Compensation Act, 24 V.I.C. Section 251 *et. seq.*, is unique and unusual in comparison with other similar acts around the nation due to its mandatory nature and its strict exclusive state fund provision. [1]

The Virgin Islands Workmen's Compensation Act governs the rights of recovery of workmen injured on the job in this

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1.

1. *See* A. Larsen, The Law of Workmen's Compensation, App. A-7-3 (1983) (Table 7 - Type of Law Insurance Requirements for Private Employment).

Territory. 24 V.I.C. Section 251, *et. seq.* The Act by its terms is made applicable to "all employers who employ one or more employees affected by this Chapter, whatever their wages may be . . . " 24 V.I.C. Section 251(b).

Furthermore, the Act requires that:

> Every employer should secure the payment of compensation under this chapter by insuring with the Government Insurance Fund created by this chapter. 24 V.I.C. Section 272(a).

Thus, not only does the Act cover every employer and employee in the Virgin Islands, with limited exceptions not relevant here, it requires that every employer and employee be covered and pay premiums into the Government Insurance Fund, the exclusive fund which pays losses compensable under the Act. *See,* 24 V.I.C. Section 265.

Those employers who strictly comply with the provisions of the Virgin Islands Workmen's Compensation Act are immune from suit by their employees for injuries suffered by said employees while on the job:

> When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer . . . 24 V.I.C. Section 284.

Therefore, for workers employed by entities which are insured in the Government Insurance Fund pursuant to the requirements of the Act, workmen's compensation is the exclusive remedy as against their employer. However:

> In cases where the injury, the occupational disease or the death entitling the workmen or employee or his beneficiaries compensation in accordance with this chapter has been caused under circumstances making

> third persons responsible for such injury, disease or death, the injured workmen or employee or his beneficiaries may claim or recover said injury, disease or death within two years following the date of the injury. 24 V.I.C. Section 263.

Mr. Vanterpool's suit, therefore, sought damages pursuant to the above from Hess as the third-party responsible for his injuries.

Defendant below, Hess Oil Virgin Islands Corp., moved in the District Court for Summary Judgment. The basis asserted by Hess for its Motion was that Mr. Vanterpool was the common law "borrowed employee" of Hess at the time of his injuries and that Hess was therefore entitled to the protection of the immunity provision of the Workmen's Compensation Act. 24 V.I.C. Section 284.

The District Court denied the Motion. (Appendix "B"). Although it held the borrowed employee doctrine applicable, it further held that the borrowed employee's knowing consent to the waiver of his common law rights against his borrowing employer was necessary to establish worker's compensation as his exclusive remedy. See, *Vanterpool, et al v. Hess Oil Virgin Islands Corp.*, 589 F. Supp. 334, 340 (D.C.V.I. 1984).

Upon motion by Defendant below, the District Court certified two questions for interlocutory review by the Third Circuit pursuant to 28 U.S.C. Section 1292(b). These questions were: (1) whether the borrowed employee doctrine applies in the Virgin Islands so that worker's compensation may supply the exclusive remedy for injuries sustained by an employee loaned to the borrowing employer and engaged in the performance of a borrowing employer's work; and (2) whether, to establish worker's compensation as an injured employee's exclusive remedy against a borrowing employer, the borrowed employee must be shown to have knowingly waived his common law right to maintain a tort action for personal injury against the borrowing employer. (Appendix "E"). Upon review, the Third Circuit clearly

shunned the "clearly erroneous" standard of reviewing decisions of District Courts in insular territories on matters of the interpretation of local statutes espoused by the Ninth Circuit in *Laguna v. Guam Visitors Bureau*, 725 F.2d 519 (9th Cir. 1984), and by the U.S. Supreme Court, *Sancho v. Texas Company*, 308 U.S. 349 (1940). Instead, using the legal error standard of review previously enunciated by it in *Saludes v. Rames*, 744 F.2d 992, 994 (3d Cir. 1984), the appeals court affirmed so much of the District Court's holding that the borrowed employee doctrine applied in the Virgin Islands. The Third Circuit panel then went on to disagree with the lower court's interpretation of the local workmen's compensation statutory scheme and reversed the District Court by holding that a worker could be a borrowed employee in the Virgin Islands and be barred from bringing suit without a demonstration that the worker knowingly and intelligently waived his common law rights as against the borrowing employer.

REASONS FOR GRANTING WRIT

The case presented by petitioners herein seeks to resolve the issue of the appropriate standard of review for reviewing Federal appellate decisions of the territorial courts pertaining to local matters or territorial statutes.

There is a clear conflict between the Third Circuit and the Ninth Circuit as to the appropriate standard of review. The Third Circuit has consistently applied the legal error standard in reviewing the decisions of the District Court of the Virgin Islands on issues of local law. *Saludes, supra*, at 994; *Silverlight v. Huggins*, 488 F.2d 107 (3d Cir. 1973). The Court of Appeals for the Ninth Circuit, on the other hand, has firmly adopted the deferential "clearly erroneous" or "manifest error" standard in reviewing the decisions of the U.S. District Court of Guam, a court identical to the Virgin Islands District Court. *See, e.g., Laguana v. Guam Visitors Bureau*, 725 F.2d 519, 520-21 (9th Cir. 1984); *Chase Manhattan Bank, N.A. v. Gems-By-Gordon, Inc.*, 649 F.2d 710 (9th Cir. 1981).

Like Guam, the U.S. District Court of the Virgin Islands was created by Congress pursuant to Article 4, Section 3, C1.2 of the Constitution. *O'Donoghue v. United States*, 289 U.S. 516 (1933). It is vested with original jurisdiction for causes of action which arise under local law. 48 U.S.C. Section 1612 (1976); 4 V.I.C. Section 32. Furthermore, it is also the court to which decisions of the territorial court are appealed. 48 U.S.C. Section 1612; 4 V.I.C. Section 33. Thus, the Virgin Islands District Court not only decides issues of local matters as a trial court, but also interprets local law as the highest court in the Territory.

It is axiomatic that federal courts must follow state law. The purpose for this was articulated by Congress when it enacted the Judiciary Act of September 24, 1789, C.20, 28 U.S.C. Section 725, now 28 U.S.C. Section 1652, known as the Rules of Decision Act, requiring that state law be followed in order to obtain uniformity of decisions between the state courts and the federal courts sitting in the states. *Erie v. Tompkins*, 304 U.S. 64 (1938), furthered this goal by declaring that state law, within the context of the Rules of Decision Act, encompasses not only legislative enactments, but also included decisional law of state courts. The underlying policy of the Judiciary Act as expressed in *Erie v. Tompkins, supra*, applies with equal force to territorial law and decisions by territorial courts, *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938), where the Court stated at p. 109:

> While the 34th section of the Judiciary Act is not applicable to territories, the arguments of policy in favor of having the state courts declare the law of the state are applicable to the question of whether or not territorial courts should declare the law of the territories with the least possible interference.

In *Waialua*, the Supreme Court also established a narrow standard of review for Courts of Appeal holding that they were not to interfere with the decisions of Territorial tribunals unless manifestly erroneous.

This Court reiterated its position that the decision of territorial courts are entitled to deference in *Sancho v. Texas Company, supra:*

> To reverse a judgment of a [local] tribunal on such a local matter as the interpretation of an act of the local Legislature it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the [local] tribunal chose what might seem on appeal to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. *For to justify reversal in such cases the error must be clear or manifest; the interpretation must be inescapably wrong, the decision must be patently erroneous.* (Emphasis supplied).

Thus, it would appear that the Third Circuit's adherence to the legal error standard of review contravenes not only the clearly erroneous standard employed by the Ninth Circuit, but is also contrary to applicable Supreme Court precedent. *See, also, DeCastro v. Board of Commissioners of San Juan,* 322 U.S. 451 (1954).

In the matter *sub judice,* the decision of the district court would certainly have been upheld under the deferential "clearly erroneous" standard. Its opinion concerned the workmen's compensation statute in the Virgin Islands, a matter of purely local concern. The District Court interpreted the statutorily defined terms "employee" and "employer" as being broad enough to encompass the "borrowed employee" doctrine. Furthermore, the trial court, apparently aware of local industrial practices and the generally unsophis-

ticated nature of the Caribbean labor force,[2] held that a worker could become the "borrowed employee" of a "borrowing employer", thereby restricting the employee to workmen's compensation benefits upon injury, only if the worker knowingly consented to the new employment relationship. Finally, the District Court interpreted the requirement of "knowing consent" to include the employee's knowledge that by entering into the new employment relationship, the employee was potentially waiving his common law right to sue the "new" employer.

The Third Circuit panel disagreed with the District Court's interpretation of the local Workmen's Compensation Act. Substituting its own criteria for "knowing consent", it held that knowledge by the worker that he was giving up his common law right to sue his "borrowing employer" in the event of injury was not a prerequisite to the application of the workmen's compensation provision immunizing employer's from suit by its employees.

It is Petitioners' position that had the Third Circuit used the deferential standard of review applied by the Ninth Circuit under identical circumstances, the decision of the District Court would clearly have been affirmed in its entirety.

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2. Notably, the underlying rational for the deference shown to Territorial court decisions by the Ninth Circuit is that the "local Guam needs and customs may differ from those with which federal courts would otherwise be familiar . . ." *Laguana, supra,* at 320. The same deference should be shown to the local needs and customs of the Virgin Islands.

CONCLUSION

For all of the above reasons, this petition for a writ of certiorari should be GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3506

GEORGE N. VANTERPOOL
MARJORIE VANTERPOOL, his wife

vs.

HESS OIL V.I. CORP.,

Appellant

On Appeal from the District Court
of the Virgin Islands (St. Croix)
D.C. Civil No. 84-0341

Argued: February 7, 1985

BEFORE: GARTH and BECKER, *Circuit Judges*
and ROSENN, *Senior Circuit Judge*

(Opinion filed June 28, 1985)

OPINION OF THE COURT

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GARTH, *Circuit Judge:*

This appeal comes to us as a certified question pursuant to 28 U.S.C.§ 1292(b). We are asked to decide two questions: 1) whether the borrowed employee doctrine applies in the Virgin Islands so that workers' compensation may supply the exclusive remedy for injuries sustained by an employee loaned to the borrowing employer and engaged in the performance of a borrowing employer's work;[1] and 2) whether, to establish workers' compensation as an injured employee's exclusive remedy against a borrowing employer, the borrowed employee must be shown to have knowingly waived his common law right to maintain a tort action for personal injury against the borrowing employer.

We hold that the "borrowed employee doctrine" applies in the Virgin Islands and that no express waiver of an employee's common law rights as against the borrowing employer need be demonstrated.

---

1. We note that since the district court's decision in this matter, the Legislature of the Virgin Islands, has amended the Workmen's Compensation Act, V.I. Code Ann. tit. 24, § 251 *et seq.* (1978), to provide that the borrowed employee doctrine shall not apply in the Virgin Islands. *See* Omnibus Authorization Act of 1985, No. 5014, § 213 (Oct. 19, 1984). Under the amended statutory scheme, a borrowing employer may remain a third-party tortfeasor against whom an injured employee may bring a common law action for personal injuries. The amendment's effect is prospective only. Thus the revised statute, while applicable in future cases, does not govern the present controversy.

I.

Litwin Panamerican Corporation ("Litwin") and Hess Oil Virgin Islands Corporation ("HOVIC") entered into an agreement whereby Litwin was to provide personnel to perform general maintenance and turnaround work at HOVIC's St. Croix refinery.[2] Litwin workers were divided into two labor classifications: Type-I personnel, over whom HOVIC assumed direct control and supervision, and Type II personnel, over whom Litwin retained direct control and supervision. This appeal concerns only Type I personnel.

The Litwin-HOVIC agreement expressly provided that "Type I work is defined as that performed by CONTRACTOR'S (Litwin's) craftsmen, foremen and supervisors . . . where such employees have been loaned to HOVIC and are under HOVIC's direct supervision, direction and control, and CONTRACTOR has no general or turnaround superintendant assigned to the work." App. at 23. The agreement further provided that maintenance and turnaround workers would be furnished in the numbers and according to the skills requested by HOVIC. *See* app. at 24-25. Even if Litwin were asked on occasion to supply a turnaround supervisor or coordinator, HOVIC would thereafter assume direction and control of all personnel. *See* app. at 25.

Thus, although the term of a given employee's assignment to HOVIC was not fixed, any assigned Type-I employee would necessarily work under the direct supervision and control of HOVIC. Borrowed employees, such as Vanterpool, who was borrowed by HOVIC from Litwin, remained on the Litwin payroll and Litwin made insurance premium payments to the

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2. Turnaround work consists of the disassembly, cleaning, and reassembly of various pipelines and parts used in the refinery process.

statutory workers' compensation fund. *See* app. at 31. HOVIC, in turn, reimbursed Litwin for all payroll expenses incurred for borrowed employees, including workers' compensation premiums. *See* app. at 104 (affidavit of Edward L. Weinman, Controller of HOVIC). This reimbursement was made by including the cost of procuring workers' compensation insurance as a factor in the scheduled time and materials rate paid to Litwin for borrowed employees. *Id.*

George Vanterpool was first hired by Litwin to work as a Hess turnaround loanee (borrowed employee) in July 1976. Thereafter, he was rehired on nine separate occasions. Prior to each assignment, Vanterpool signed a "Rehire Form" prepared by Litwin. The rehire form stated in pertinent part:

> This is to inform you of the conditions under which you will be working while a "Hess Turnaround Loanee".
>
> You should be aware that while working as a Loanee:
>
> 1. HOVIC personnel will control, direct and supervise all aspects of your work.
> 2. At no time should you receive, or act under instructions from Litwin Supervision.
> 3. HOVIC will provide you with safety equipment and will ensure that all safety conditions surrounding your work are met.

Vanterpool both signed the rehire form in its entirety and initialed the specific provision relating to the conditions of his employment.

On September 11, 1979, Vanterpool signed a rehire form and began work at the HOVIC refinery. On November 17, 1981, while working with a large mobile welding machine, Vanterpool injured his back. He thereafter filed a claim for workers' compensation and

received compensation from the Government Insurance Fund for $110.00 in medical costs. App. at 91. Although this compensation claim was processed by the Fund against Litwin, HOVIC reimbursed Litwin for the actual cost of Litwin's contribution to the Fund pursuant to the rate schedules established by the Litwin-HOVIC agreement.

Vanterpool then brought the present action against HOVIC, seeking damages for personal injury sustained because of HOVIC's alleged negligence. HOVIC moved for summary judgment[3] on the grounds that the action of a borrowed employee was barred by the exclusive remedy provision of the Virgin Islands Workmen's Compensation Act, V.I. Code Ann. tit. 24, § 284.[4] This motion was denied. The district court held

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3. Vanterpool's complaint alleges that at the time of his injury, Vanterpool worked "according to the instructions of Hess Oil Virgin Islands Corp. personnel." App. at 2. A subsequent affidavit, submitted by Vanterpool, states that "the details of [Vanterpool's] work were directed by a pipefitter who was employed by Litwin." App. at 65. Although Vanterpool thus attempts to create an issue of fact, it is not one sufficiently material to preclude this court or the district court from deciding whether, as a matter of law, HOVIC might be deemed Vanterpool's statutory employer for purposes of workers' compensation. By the express terms of the Litwin-HOVIC agreement, all loanees engaged in turnaround work were to act pursuant to the direction and control of HOVIC. It is undisputed that at the time of his injury, Vanterpool was performing HOVIC's work, on HOVIC's property, and with the use of HOVIC equipment.

4. V.I. Code Ann. tit. 24, § 284 provides:

> § 284. Exclusiveness of remedy
>
> When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, an employee not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be the same as if this chapter did not exist.--Amended June 15, 1961, No. 762, Sess. L. 1961, p.109.

that although the borrowed employee doctrine applied, the borrowed employee's knowing consent to the waiver of his common law rights against his borrowing employer was necessary to establish workers' compensation as his exclusive remedy. See *Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F.Supp. 334, 340 (D.C.V.I. 1984) Because the court found a material issue of fact existed as to whether Vanterpool had knowingly consented to waive his common law rights against HOVIC, it declined to enter summary judgment for HOVIC. *Id.* at 341.

Upon motion by HOVIC, the district court certified for appeal to this court the questions of the applicability of the borrowed servant doctrine and the requirement that a borrowed employee knowingly waive his common law rights against his borrowing employer. We, in turn, granted HOVIC's petition for leave to appeal pursuant to 28 U.S.C. § 1292(b).

II.

A.

The initial question which we must decide is whether the borrowed employee doctrine applies within the statutory framework of the Virgin Islands Workmen's Compensation Act, V.I. Code Ann. tit. 24, § 251 *et seq.* To answer that question, an understanding of the doctrine and its origins is essential.

Under the borrowed employee doctrine, if a special (borrowing) employer exercises a sufficient degree of control over a borrowed employee for a time sufficient to suggest that the employee has assessed the risks of his new employment and has acquiesced in his borrowing employer's control, the borrowing employer may be deemed a statutory employer for purposes of workers' compensation. *See generally* 1C A. Larsen, Workmen's Compensation Law § 48.10 (1982). The

borrowed employee is then barred from suing his borrowing employer for injuries sustained during the course of his employment; instead, the borrowed employee is remitted to the exclusive remedy provided by the relevant workers' compensation act. We must therefore determine whether HOVIC is shielded from common law tort liability as Vanterpool's employer within the meaning of the Virgin Islands Act or whether HOVIC remains a third-party tortfeasor against whom Vanterpool may maintain an individual action.

The borrowed employee doctrine was first recognized by the Supreme Court in *Standard Oil v. Anderson*, 212 U.S. 215 (1909). The Court stated that "[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation." 212 U.S. at 220. The Court further explained:

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished.

Id. at 221.

Because *Anderson* concerned the imputed negligence of a borrowed employee (a winchman "borrowed" by the shipowner defendant from the winchman's general employer, the stevedore), this

initial statement of the doctrine was developed in the context of *respondeat superior*. Accordingly, the Court emphasized the element of control as determinative of the question of vicarious liability. That the borrowed employee doctrine originated in an attempt to assign tort liability to the employer (shipowner) properly responsible for an employee's (the winchman's) tortious acts has not prevented the doctrine's extension to the context of workers' compensation disputes where it, in effect, limits the common law liabilities of the controlling employer.

The application of the borrowed employee doctrine in the workers' compensation setting is neither unfair nor unreasonable when it is remembered that compensation liability cannot exist in the absence of some express or implied contract of hire between the borrowed employee and the borrowing employer. *See* 1C. A. Larsen, *supra* at 8-319. To ensure that the doctrine is not invoked indiscriminately to curtail the common law rights of borrowed employees, other courts have emphasized a number of factors beyond mere control which are to be considered in the workers' compensation context. These include *inter alia:* 1) whether the second (borrowing) employer was itself responsible for the working conditions and the attendant risks experienced by the employee; 2) whether the employment with the borrowing employer was of such duration that the employee could be reasonably presumed to have evaluated and acquiesced in the risks of his employment; and 3) whether the work performed was that of the borrowing employer. *See Gaudet v. Exxon Corp.*, 562 F.2d 351, 357 (5th Cir. 1977); *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969); *Tarboro v. Reading Co.*, 396 F.2d 941, 943 (3d Cir. 1968).

Were the relationship between HOVIC and Vanterpool deemed to satisfy these factors, there is no

apparent public policy which would preclude application of the borrowed employer doctrine to the present case. Although it is true that the Virgin Islands Act, like most compensation statutes, preserves an employee's right of action against third parties, the Act is intended to provide an injured employee with certain and absolute benefits in lieu of possible and speculative common law benefits obtainable only in tort actions against his employer. Indeed, as Vanterpool acknowledges, the Virgin Islands Act is mandatory; it conditions all employment within the Islands.[5] When an employee begins work for an employer covered under the Act, he is automatically remitted to remedies under the compensation scheme for any injuries occasioned by his employer. Only when an employer fails to secure the insurance required under the Act is an employee's common law tort action against his employer preserved. *See* V.I. Code Ann tit.

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5. Vanterpool argues that because the Virgin Islands Act is a compulsory insurance scheme which requires an employer to contribute to an exclusive government fund, the borrowed employee doctrine cannot apply. That an employer must participate in a government administered fund rather than purchase insurance through a private carrier or act as a self-insurer does not, however, affect the availability of the borrowed employee doctrine. *Cf.* 4 A. Larson, Workmen's Compensation Law, App. A, Table 7 (summary of insurance requirements for private employment in different jurisdictions). The ultimate funding source is itself irrelevant to arrangements such as the Litwin-HOVIC agreement, where the costs of procuring insurance from any source is shifted from the original employer to the borrowing employer. Had the Virgin Islands enacted a compulsory insurance statute which allowed an employer to choose between the participation in a government fund or the purchase of private insurance, Vanterpool's relation to both Litwin and HOVIC would remain unchanged. Indeed, a borrowed employee's knowledge of and acquiesence in the risks inherent in his new employment is in no manner dependent upon his knowledge of the source from which compensation benefits may eventually be provided.

24, § 261(b)(1).[6] Thus, an employer's tort immunity arises as an inevitable consequence of compliance with the Act and loss of immunity is imposed only as a penalty for non-compliance.[7]

If, then, the relationship between HOVIC and Vanterpool may be characterized as one between employer and employee within the meaning of the Act, Vanterpool's remedies against HOVIC would necessarily be limited to those provided by the compensation statute. Indeed, the borrowed employee doctrine, although developed in a different context, may serve to clarify the nature of the employment relation that obtained between Vanterpool and HOVIC. For the doctrine itself is but a means of determining which of two potentially liable actors functioned as an injured employee's actual employer. Thus, numerous jurisdictions have applied the doctrine to determine an employer for purposes of workers' compensation. *See, e.g., Hebron v. Union Oil Co.*, 634 F.2d 245 (5th Cir. 1981)(applying borrowed employee doctrine to determine whether Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, would supply injured employee's exclusive remedy); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977)(same); *Benoit v. Transco Exploration Co.*, 577

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6. V.I. Code Ann. tit. 24, § 261(b)(1) provides:

> (b)(1) The insured employee of an uninsured employer, or the employee's beneficiaries, instead of receiving compensation under this chapter may elect, at any time prior to the rendering of a decision by the Commission, to bring suit for damages against the employer, just as if this chapter were not applicable.

7. That an employer's immunity is lifted as a punitive measure is made clear by V.I. Code Ann. tit. 24, § 1261(3) which prohibits an uninsured employer from asserting the common law defenses of contributory negligence, assumption of risk, or fellow servant in a resultant tort action.

F.Supp. 304 (W.D.La. 1983) (doctrine applied to determine whether workers' compensation statute supplied exclusive remedy); *Hooper v. Exxon Corp.*, 571 F.Supp. 477 (7 D. La. 1983) (same). Moreover, the borrowed employee doctrine has been recognized in the Virgin Islands by virtue of the Restatement (Second) of Agency §§ 220. 227 (1958),[8] treated as the applicable rules of decision in the absence of local law to the contrary. *See* V.I. Code Ann. tit. 1, § 4.

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8. Restatement (Second) of Agency § 220 provides:

> § 220. Definition of Servant
>
> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

B.

We turn to the question of whether the borrowed employee doctrine is embraced within the express statutory terms of the Virgin Islands Act.[9] Section 251 of the Act defines "employee" and "employer" in the following manner:

> "Employee" means any person, including a minor, employed under any appointment or contract, express or implied, oral or written, or in the service of any employer.
>
> "Employer" means the Government of the Virgin Islands, all public and quasi-public corporations, any person or body of persons whether incorporated or not, any partnership or association, contractors and subcontractors.

The definitions are broad. Although on their face they do not specify at what point an employer, like HOVIC, may be deemed the statutory employer for purposes of the Act, neither do they prohibit consideration of

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> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

Restatement (Second) of Agency § 227 provides:

> § 227. Servant Lent to Another Master
>
> A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others.

9. As previously noted, *see supra* at note 1, we here deal only with the unrevised statute which applied at the time the events giving rise to this litigation transpired.

agreements such as that between Litwin and HOVIC. We conclude that the scope of the statutory definitions is sufficiently broad to include the special employer status that existed between Vanterpool and HOVIC, particularly where Vanterpool may be presumed to have consented to his borrowing employer's control and to have acquiesced in the risks associated with his special employment.

Vanterpool relies upon *Colon Nunez v. Horn-Linie*, 423 F.2d 952 (1st Cir. 1970) to argue that HOVIC cannot be an employer within the meaning of the Virgin Islands Act.[10] In *Colon Nunez*, the court held that the employee of an insured independent stevedore could sue a shipowner where the shipowner had contracted with the stevedore to provide services. The *Colon Nunez* decision overruled *Musick v. Puerto Rico Telephone Co.*, 357 F.2d 603 (1st Cir. 1966), a case almost identical on its facts to the present controversy.

In *Musick*, plaintiff's original employer, International Communications Corporation, contracted to do maintenance and construction work for Telephone. Plaintiff was injured, received compensation from I.C.C., and then sued Telephone. The *Musick* court held that the injured employee of an insured independent contractor could not entertain a tort action against the primary contractor. *See* 357 F.2d at 605. Central to the *Musick* court's holding were the conclusions that Telephone could be deemed the statutory employer of the independent contractor's

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10. *Colon Nunez* was based upon Puerto Rico's workers' compensation statute from which the Virgin Islands Act was adopted in 1954. Only those extraterritorial decisions which interpret adopted legislation prior to the date of its enactment by the Virgin Islands constitute binding precedent in the courts of the Virgin Islands. *See* Berkeley v. West Indies Enterprises, Inc., 480 F.2d 1089, 1095 (3d Cir. 1973). *Colon Nunez* is thus persuasive, but not binding authority in the Virgin Islands.

employees and that by requiring the independent contractor to procure insurance, the costs of which were transferred to Telephone, the latter, in effect, had "insured" the I.C.C. employees. Telephone, as the statutory employer, was thus held immune from suit.

Colon Nunez's rejection of the *Musick* logic has been criticized[11] and expressly rejected by the Puerto Rican Supreme Court in *Lugo Sanchez v. Puerto Rico Water Resources Authority*, 105 P.R.R. 850 (1977). Indeed, in *Lugo Sanchez*, the Puerto Rican Supreme Court endorsed the proposition that an employer who requires his independent contractors to take out workers' compensation insurance has "insured" the workmen of the independent contractor and is therefore immune from suit under the exclusive remedy provision of the Puerto Rico Workmen's

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11. In discussing *Colon Nunez*, Larson states that the decision contradicts not only the court's own prior decision in *Musick*, but also the majority rule and the overall trend of the case law from other jurisdictions. *See* 2A A. Larson, *supra* § 72.31(b) at 14-126. Noting that the *Colon Nunez* court expressed particular concern that a foreign shipowner not be allowed to shift the burden of an injured worker's loss back onto the Puerto Rican economy by means of the exclusive government compensation fund, *see* 423 F.2d at 956, Larson characterizes the decision as a "morsel of xenophobia." 2A A. Larson, *supra* § 72.31(b) at 14-126.

More significantly, the *Colon Nunez* court argues that because Puerto Rico's compensation law is mandatory and comprehensive, no incentive is needed to induce contractors to insist that their subcontractors carry insurance. As Larson comments, however, the mandatory nature of the statute is not alone sufficient to guarantee universal compliance. *See* 2A A. Larson, *supra* § 72.31(b) at 14-126. Under neither the Puerto Rican nor the Virgin Islands scheme should a principal, who requires that his contractor comply with the applicable compensation law, be effectively penalized by thereby being precluded from ever being considered a statutory employer for purposes of workers' compensation.

Accident Compensation Act, 11 L.P.R.A. § 21.[12] Nor has the First Circuit followed *Colon Nunez* since *Lugo Sanchez*. *See Martinez v. Compania Trasatlantica Espanola S.A.*, 643 F.2d 897 (1st Cir. 1981) (in longshoreman's suit for injury against shipowner, shipowner was immune from suit and entitled to benefit of exclusive remedy provision, even though compensation premium was paid by the stevedore); *Garcia v. Friesecke*, 597 F.2d 284 (1st Cir.), *cert.denied*, 444 U.S. 940 (1979) (same).[13]

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12. 11 L.P.R.A. § 21 provides in pertinent part:

> When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer . .

The facts in *Lugo Sanchez*, which called 11 L.P.R.A. § 21 into play, may be briefly summarized. The plaintiff was an employee of an independent contractor who had contracted with the defendant Authority to construct and maintain several thermoelectric plants. Steam valves in the plants required periodic repairs and prior to each repair, defendant Authority would be notified to remove all steam from the line. When the plaintiff began to disassemble a particular valve, he was injured by an escaping steam jet. Plaintiff's original employer was insured in accordance with the Puerto Rican Act and the plaintiff received compensation benefits. He thereafter sued the Authority as a third-party whose negligence caused his personal injury. The Supreme Court of Puerto Rico held that under the circumstances, the Authority was not a third party but rather was plaintiff's statutory employer and hence immune from suit.

13. The precise statutory provision upon which the *Lugo Sanchez* court and subsequent courts relied in interpreting the Puerto Rican Act was 11 L.P.R.A. § 20 which states:

> § 20. Employer to report all wages
>
> Every insured employer shall, on reporting his annual payrolls, include in said payrolls the wages paid to all the workmen and employees working for or employed by him, whether by the job or under some person with whom the employer contracted for the job.

We therefore conclude that the borrowed employee doctrine, as articulated and applied by the *Musick* court, may be encompassed within the statutory framework of the Virgin Islands Act. In the present case, Vanterpool specifically signed a Rehire Form designating HOVIC as his controlling employer. Indeed, once Vanterpool completed this form, he can have entertained little doubt that he would be working as a "Hess Turnaround Loanee." The mere fact that HOVIC chose to reimburse Litwin for the latter's payments to the workers' compensation fund rather than to undertake such direct payments itself should not preclude HOVIC from being deemed a statutory employer for purposes of the Virgin Islands Act. Accordingly, we hold that the employment arrangement which obtained between Vanterpool and HOVIC comes within the class of special employments

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or under a contractor or independent subcontractor employed or contracted by said employer: and all accounts or taxes collected by the State shall be based on the employer's current payroll in which shall be included the above-mentioned laborers: Provided, That this provision shall not be applicable to employers for whom work is done by an independent contractor who is insured as an employer under the provisions of this chapter.

The Virgin Islands Act contains no equivalent provision. Resort to section 20, however, was necessary because the Puerto Rican statute does not directly define employer or employee. This difference should not be allowed to obscure the fundamental policy behind *Musick* - that immunity is required to guarantee that an employer who insists that its contractors carry insurance is not in fact penalized for enforcing compliance with the law.

Indeed, to accept Vanterpool's argument, that omission of a similar reporting provision in the Virgin Islands statute bars HOVIC from being deemed a statutory employer, leads to the anomalous result that HOVIC should prefer not to have its contractors purchase insurance, since the consequence of their purchase would be that HOVIC would inevitably have the status of a third-party.

covered by the borrowed employee doctrine as applied in the Virgin Islands.

III.

The sole remaining question in this appeal is whether, in order to establish workers' compensation as an injured employee's exclusive remedy against a borrowing employer, the borrowed employee must have expressly and knowingly waived his common law right to maintain a tort action for personal injury against his borrowing employer. We hold that no express and knowing waiver of a borrowed employee's common law rights need be shown where an employee's consent to, and acquiescence in, his special employment by a borrowing employer may be implied from the employee's continuing course of conduct.

As we have stated, the elements of the borrowed employee doctrine may differ when the doctrine is extended beyond its original use as a means to assign vicarious liability. When confronted by the doctrine's application in the workers' compensation setting, other courts have emphasized not only the element of the borrowing employer's control, but also whether the borrowed employee has made a contract of hire, either express or implied, with the borrowing employer (in this case HOVIC) and whether the work being done is essentially that of the borrowing employer (HOVIC). *See generally* 1C A. Larson, *supra* § 48.10.

Because the foundation of workers' compensation rests on the contract for *hire*, the threshold inquiry must be whether the employee made such a contract with the borrowing employer. *See* 1C A. Larson, supra at 8-318-319. This inquiry, however, is different from whether the employee consented to accept the compensation scheme as well. As previously noted, where the scheme is mandatory, it conditions all employment. The borrowed employee may or may not make an express or implied contract for hire with a

borrowing employer, but once such a contract is made, there is no secondary inquiry as to whether the employee consents to the application of the compensation scheme itself.

In the present case, the district court has sought to engraft just such a secondary inquiry onto the routine analysis used in borrowed employee cases. In seeking to accord maximum protection to a borrowed employee's common law rights, the district court would require Vanterpool's "consent to be an employee of HOVIC in the knowing sense." 587 F.Supp. at 340. Yet, to require the knowing and intelligent waiver by a borrowed employee of his common law right to sue his borrowing employer is to impose an essentially redundant requirement, particularly if the need for an express or implied contract of hire is scrupulously observed. Indeed, other courts have not discussed or imposed a knowing and intelligent waiver requirement presumably because the inquiry into whether an express or implied contract of hire exists adequately accounts for the employee's consent.[14] Nor has such

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14. In concluding that an employee's knowing waiver of his right to maintain a common law action for negligence against his borrowing employer was an essential element of the borrowed employee doctrine, the district court reiterated Larson's admonition that special attention must be paid to the employee's consent to his new employment. *See* 589 F.Supp. at 338. The relevant passage in Larson states:

> In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed, and there is no need to go into tests of relative control and the like.
>
> This must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important

consent been limited to an express or formal agreement; consent has also been implied from an employee's prolonged acceptance of the special employer's control and direction. *See, e.g., Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977).

Thus, the pertinent inquiries in applying the borrowed employee doctrine in the context of workers' compensation have been framed as: "(1) was the second [borrowing] employer itself responsible for the working conditions experienced by the employee, and the risks inherent therein, and (2) was the employment with the new [borrowing] employer of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced thereto?" *Gaudet*, 562 F.2d at 357; *see also Hebron v. Union Oil Co.*, 634 F.2d 245 (5th Cir. 1981).

In the present case, the rehire form shows Vanterpool had specific knowledge that he would work as a Hess Turnaround Loanee under the supervision and control of Hess. His employment, although intermittent between July 1976 and November 1981, was not equivalent to a case where an employee

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> of all, he loses the right to sue the special employer at common law for negligence; and when this question has been presented in this form, the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.

1C A. Larson, *supra* § 48.10 at 8-319. Even in this formulation offered by Larson, the emphasis upon the deliberate and informed consent of the employee relates to the contract of hire rather than to some secondary and subsequent waiver of an employee's right to sue at common law. Indeed, as Larson makes clear, consent to special employment necessarily entails loss of a borrowed employee's common law remedies, when a workers' compensation statute obtains.

momentarily leaves the worksite of his general employer and works temporarily for another (special) employer. At the time of his injury, Vanterpool had worked continuously at the HOVIC refinery for over two years. He thus had ample opportunity to assess and acquiesce in the risks attendant to his special employment.

Moreover, a crucial factor, not to be overlooked, is that with respect to Type I personnel, over whom HOVIC assumed direct control and supervision, Litwin functioned essentially as an employment broker. As such, Litwin was no more than a conduit to employment by others. It is difficult to conceive how a Type I employee, who obtained employment through Litwin, could be deemed to do anything *other* than consent to work for HOVIC.

We therefore conclude that an express and knowing waiver of a borrowed employee's common law rights is not a necessary element of the borrowed employee doctrine. Vanterpool was afforded clear notice that he would work under the direct control and supervision of HOVIC, on HOVIC's premises, and in the performance of HOVIC's work. His employment was of sufficient duration so that Vanterpool may be reasonably presumed to have evaluated the risks of his work environment and to have acquiesced in those risks.

Because the district court found that all elements of the borrowed employee doctrine, other than the knowing waiver requirement, were factually present and that no genuine issue of material fact existed with respect to any of these other elements, *see* 589 F.Supp. at 340, our conclusion that a knowing waiver requirement forms no part of the borrowed employee doctrine necessarily entitles HOVIC to the benefit of the exclusive remedy provision of the Workmen's Compensation Act, V.I. Code Ann. tit. 24, § 284.

Accordingly, Vanterpool is barred by the Act from maintaining an action for negligence against HOVIC.

IV.

In summary, we hold that the borrowed employee doctrine applies in the Virgin Islands and may permit workers' compensation to supply the exclusive remedy for injuries sustained by a borrowed employee engaged in the performance of a borrowing employer's work. However, to establish a borrowing employer as a statutory employer entitled to the benefits of the exclusive remedy provision of the Act, a borrowed employee must have consented to an express or implied contract of *hire* with the borrowing employer. Moreover, a borrowed employee's special employment must have been of a nature and of sufficient duration so that the employee may be presumed to have evaluated and acquiesced in the risks of his new employment. When these requirements are met, we hold that no express waiver of a borrowed employee's common law rights need be shown to entitle a borrowing employer to immunity from suit.

Accordingly, we answer the first question - whether the borrowed employee doctrine applies in the Virgin Islands so that workers' compensation may supply the exclusive remedy for injuries sustained by an employee loaned to the borrowing employer and engaged in the performance of a borrowing employer's work - in the affirmative.

We answer the second question - whether, in order to establish workers' compensation as an injured employee's exclusive remedy against a borrowing employer, the borrowed employee must be shown to have knowingly waived his common law right to maintain a tort action for personal injury against his borrowing employer - in the negative.

By our answers, we therefore will affirm so much of

the district court's order of June 7, 1984 as holds that the borrowed employee doctrine applies in the Virgin Islands. We will reverse so much of that order as holds that a borrowed employee's knowing and intelligent waiver of his common law right to sue must be shown. Having reversed the district court's order, we will remand this proceeding to the district court with the direction that the district court enter judgment in favor of HOVIC because as a matter of law, HOVIC is to be deemed Vanterpool's statutory employer against whom an action for negligence is barred.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

GEORGE N. VANTERPOOL, and Marjorie Vanterpool, his wife, Plaintiffs,

v.

HESS OIL VIRGIN ISLANDS CORP., Defendant.

Civ. No. 1983/341.

District Court, Virgin Islands
D. St. Croix.

June 7, 1984.

Laborer who was borrowed by another employer brought action against the borrowing employer for common-law damages rising from injury sustained while doing work for the borrowing employer. The District Court, David V. O'Brien, Jr., held that: (1) the "borrowed employee" doctrine applies in the Virgin Islands, and (2) genuine issues of material fact existed with respect to whether the laborer knowingly consented and fully acquiesced to waiver of third-party common-law rights when he signed "rehire form," precluding summary judgment.

Defendant's motion for summary judgment denied.

1. Workers' Compensation 2164

In a workmen's compensation setting, "borrowed employee" doctrine bars worker who is employed by one employer and borrowed temporarily by another employer from filing any common-law action for damages, if he is injured, against the borrowing employer in the same manner as he is barred from an action against his regular employer.

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation 2164

Essential factors to be considered in whether the "borrowed employee" doctrine applies are: who had control over the employee and the work he was performing, whose work was being performed, whether there was agreement between original and borrowing employer, and whether employee consented and acquiesced in the new situation.

3. Workers' Compensation 2164

In considering whether the "borrowed employee" doctrine applies, elements of control and clear understanding that the employee has been shifted from general employer to perform services for special employer will be given greater weight in cases in which intent is to hold employer liable under theory of respondeat superior for acts of an employee.

4. Workers' Compensation 2164

In determining whether "borrowed employee" doctrine applies, question whether the employee acquiesced in the employment situation and made knowing waiver of rights will be given greater weight in case in which employee files common-law claim for damages by reason of negligence of the special employer and it is sought to bar that claim and leave the worker solely to his workmen's compensation benefits.

5. Workers' Compensation 2164

In deciding whether the "borrowed employee" doctrine can be used as a defense to common-law liability in a workmen's compensation context, factors which must be considered on issue of informed consent are whether the second employer was itself responsible for the working conditions experienced by the employee and the risks inherent thereto, and whether the employment with the new employer was of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced.

6. Federal Courts 1023

Under Virgin Islands statute, common law as expressed in restatements of the law will be rules of decision

in federal courts in absence of local laws to the contrary. 1 V.I.C. 4.

7. **Workers' Compensation** 2164

Virgin Islands' Workmen's Compensation Act is broad enough to include the "borrowed employee" doctrine. 24 V.I.C. 251 et seq., 263, 272(a), 284.

8. **Workers' Compensation** 1072

Contractor can meet requirement of insurance coverage under Virgin Islands' Workmen's Compensation Act by requiring as part of a contract that subcontractor meet burden of insurance premiums, with cost passed on to contractor. 24 V.I.C. 272(a).

9. **Workers' Compensation** 1063, 2164

Under Virgin Islands' Workmen's Compensation Act, contractor is not legally responsible for payments of insurance premiums if subcontractor fails to make those payments as promised; however, failure of the subcontractor to make such payments could leave both contractor and subcontractor open to direct action for damages by the employee, even if the "borrowed employee" doctrine is in place. 24 V.I.C. 261(b)(1), 272(a).

10. **Federal Courts** 1023

District court for the Virgin Islands is bound by other courts in their interpretation of statutes adopted by the Virgin Islands only where those decisions were rendered before the Virgin Islands adopted those statutes.

11. **Workers' Compensation** 2165

Under Virgin Islands' law, employee of insured independent contractor or subcontractor cannot entertain tort action against primary contractor. 24 V.I.C. 261(b)(1), 284.

12. **Workers' Compensation** 1706

Question of employment in a workmen's compensation matter is a fact question usually left for the jury.

13. **Federal Civil Procedure** 2497

In action brought by employee who was borrowed intermittently by another employer from July, 1976 to November, 1981, for common-law damages for injury sustained while working on borrowing employer's property and doing borrowing employer's work, genuine issue of material fact existed with respect to whether employee knowingly consented and fully acquiesced to waiver of third-party common-law rights when he signed "rehire form," precluding summary judgment. 24 V.I.C. 251 et seq., 261(b)(1), 263, 272(a), 284.

MEMORANDUM OPINION

DAVID V. O'BRIEN, District Judge.

[1] We must decide in this case whether the borrowed employee doctrine applies in the Virgin Islands. In a workmen's compensation setting, it involves the situation where a worker who is employed by one employer is borrowed by another employer to provide temporary services. When applied, the doctrine bars that employee from filing any common law action for damages, if he is injured, against the borrowing employer in the same manner, as he is barred from an action against his regular employer.

We find that the doctrine does apply in this jurisdiction, but we will deny summary judgment to the defendant because a material fact is in dispute.

I. FACTS

The plaintiff George N. Vanterpool, ("Vanterpool"), was employed by Litwin Panamerican Corporation, ("Litwin"), at the refinery of Hess Oil Virgin Islands Corp., ("HOVIC"). Litwin was essentially a labor broker supplying workers for temporary assignment at HOVIC. Vanterpool was accustomed to such assignments, he was required to execute a

certain form called a "Rehire Form", prepared by Litwin. He signed his first "Rehire Form" on July 1, 1976 with nine others to follow. The last occasion he signed such a form was on September 11, 1979.

The form, as pertinent to this case, stated:

> This is to inform you of the conditions under which you will be working while a "HESS Turnaround Loanee".
>
> You should be aware that while working as a Loanee:
>
> 1. HOVIC personnel will control, direct and supervise all aspects of your work.
> 2. At no time should you receive or act under instructions from Litwin supervision.
> 3. HOVIC will provide you with safety equipment and will ensure that all safety conditions surrounding your work are met.

Vanterpool put his initials to this part of the form, and placed his signature at the appropriate location at the bottom. He then went to work until November 17, 1981, when he was injured.

On the date of his injuries, Vanterpool was working with a large mobile welding machine, attempting to link it to a trailer hitch connected to a truck. All the above equipment was owned by HOVIC. His complaint alleges that he was doing his work "according to the instructions of HOVIC personnel," while his later affidavit claims "the details of my work were directed by a pipefitter who was employed by Litwin." There is no question Vanterpool was working on HOVIC property, doing HOVIC's work. He could have been fired by HOVIC without decisional involvement by Litwin.

Vanterpool, at the time, remained on the Litwin payroll. As part of the contract between Litwin and HOVIC under which he was working, Litwin was specifically responsible for making the insurance premium payments to the Government Insurance Fund whereby Vanterpool would be eligible for workmen's compensation benefits if injured. Litwin then

charged the expense back to HOVIC. Vanterpool received workmen's compensation benefits under this arrangement after his injury.

He also filed an action against HOVIC claiming the negligence of HOVIC was responsible for his injuries. HOVIC filed this motion for summary judgment, invoking the borrowed employee doctrine. The matter is a case of first impression in this jurisdiction. The factual situation is presented herein in the light most favorable to Vanterpool, the non-moving party.

II. HISTORY OF BORROWED EMPLOYEE DOCTRINE

The genesis of the borrowed employee doctrine is found in *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220-221, 29 S.Ct. 252, 253-254, 53 L.Ed. 480 (1908) whereby the Supreme court defined the matter as follows:

> One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent and acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

Id. at 220, 29 S.Ct. at 253.

Likewise, the Court added:

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished.

Id. at 221, 29 S.Ct. at 254.

This doctrine is contained in the Restatement (Second) of Agency 220, 227 (1958).

[2] The essential factors to be considered in whether the borrowed employee doctrine applies have remained constant since *Standard Oil, supra.* They are, in the main:

(1) Who has control over the employee and the work he is performing?

(2) Whose work is being performed?

(3) Was there an agreement between the original and the borrowing employer?

(4) Did the employee consent and acquiesce in the new situation?

Other courts have added additional factors which should also be considered, such as: who paid the employee's wages; who had the power to terminate his employment; and who furnished the tools with which the work was performed and the place for performing the work? *Tarboro v. Reading Co.*, 396 F.2d 941, 943 (3d Cir. 1968).

Which factors are to be given greater weight depends in part upon whether the case involves (1) invocation of the concept of *respondeat superior,* where one is attempting to hold the proper employer responsible for the torts of his employee, or (2) if the case involves an attempt to use the borrowed employee doctrine to bar an employee from a common law damage action and restrict him to the exclusive coverage provided by workmen's compensation. *Gaudet v. Exxon Corp.*, 562 F.2d 351, 356 (5th Cir. 1977).

The case at bar fits the pattern of the second type of case described above, in that HOVIC, claiming to be the special employer of Vanterpool, asks the Court to dismiss his common law tort claim for damages, asserting that his sole remedy is workmen's compensation benefits.

[3] The suggestion that some factors are given greater weight in certain types of cases than in others can be ex-

plained in this way: if the intent is to hold an employer under the theory of *respondeat superior* for the acts of an employee, the elements of control and a clear understanding that the employee has been shifted from the general employer to perform services for the special employer will be important. *Byrne v. Pennsylvania R.R. Co.*, 262 F.2d 906, 911 (3d Cir. 1959).

[4] But if the case involves a worker filing a common law claim for damages by reason of negligence of the special employer, and it is sought to bar that claim and leave the worker solely to his workmen's compensation benefits, then the question of whether the worker acquiesced in the employment situation and made a knowing waiver of such right becomes important. At 1C A. Larsen, Workmen's Compensation Law 48.10 at 8-319 (1982), the following point is forcefully made:

> In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: Did he make a contract of hire with the special employer? If this question cannot be answered "yes," the investigation is closed, and there is no need to go into tests of relative control and the like.
>
> This must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important of all, he loses the right to sue the special employer at common law for negligence; and when this question has been presented in this form, the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit.

[5] In deciding whether the borrowed employee doctrine can be used as a defense to common law liability in a workmen's compensation context, two other factors must be considered. These are aimed at determining the answer to the issue of informed consent. They are: (1) was the second employer itself responsible for the working conditions ex-

perienced by the employee and the risks inherent thereto, and (2) was the employment with the new employer of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced? *Gaudet, supra,* at 357.

All of that having been said, we now confront the claim by Vanterpool that the Workmen's Compensation Act of the Virgin Islands, 24 V.I.C. 251 *et seq.*, (the "Act"), does not leave room for the borrowed employee doctrine.

III. APPLICABILITY TO THE VIRGIN ISLANDS

Secion 251 of the Act contains several definitions important to our consideration:

> "Employee" means any person, including a minor, employed under any appointment or contract, express or implied, oral or written, or in the service of any employer.
>
> "Employer" means . . . any person or body of persons whether incorporated or not, any partnership or association, contractors or subcontractors.
>
> Section 272(a) provides:
>
> Every employer shall secure the payment of compensation under this chapter by insuring with the Government Insurance Fund created by this chapter.
>
> Section 284 provides:
>
> When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer . . .

Third party actions against those responsible for an injury are permitted against non-employers under Section 263 of the Act. It is asserted by Vanterpool that HOVIC was a third party and not his employer, since HOVIC did not pay the

workmen's compensation premiums on his behalf into the Government Insurance Fund. Litwin, according to Vanterpool, made all such premium payments, filed the personal injury report with the Department of Labor, and it was through Litwin's coverage that he received benefits.

[6] He argues that since the Act by express design fails to provide the vehicle for the borrowed servant doctrine, the doctrine cannot be piggybacked into the jurisdiction by the Restatement (Second) of Agency 220, 227 (1958). As is well known, 1 V.I.C. 4 provides that the common law as expressed in the restatements of the law will be the rules of decision in our courts in the absence of local laws to the contrary.

[7,8] In our view, the borrowed employee doctrine can be encompassed within the Workmen's Compensation Act. The definitions of "employee" and "employer" are broad enough to include the special employer status covered by the borrowing employer in the doctrine. And, we find, the requirement of insurance coverage can be met by a contractor, by the expedient of requiring as part of a contract that the subcontractor meet the burden of insurance premiums, with the cost passed on to the contractor.

[9] Under our Act, the contractor is not legally responsible for the payments of insurance premiums if the subcontractor fails to make those payments as promised. However, the contractor, in this case HOVIC, has great incentive to assure premiums are paid, because the failure of the subcontractor, in this case Litwin, to make such payments could leave both of them open to a direct action by the employee under Section 261(b)(1) of the Act, even if the borrowed employee doctrine is in place.[1]

1. Section 261(b)(1) states:

> The injured employee of an uninsured employer, or the employee's beneficiaries, instead of receiving compensation under this chapter may elect, at any time prior to the rendering of a decision by the Commissioner, to bring suit for damages against the employer, just as if this chapter were not applicable.

[10,11] We adopt the reasoning contained in *Musick v. Puerto Rico Telephone Co.*, 357 F.2d 603, 604 (1st Cir. 1966), since it is a case interpreting Puerto Rico's workmen's compensation statute, from which ours was comprehensively adopted in 1954. We recognize that we are only bound by other courts in their interpretation of statutes adopted by the Virgin Islands where those decisions were rendered *before* we made those statutes our own. *Berkeley v. West Indies Enterprises, Inc.* 480 F.2d 1089, 1095 (3d Cir. 1973). But we find *Musick, supra,* persuasive.

In that case the First Circuit said:

> We hold, in sum, that the employee of an insured independent contractor or subcontractor cannot entertain a tort action against the primary contractor. Not only does this seem the more probable resolution of the admittedly ambiguous statutory scheme, but we believe it is more consistent with the policies of workmen's compensation.

Id. at 608.

This view is supported by Larsen as well. 2A. A. Larsen, Workmen's Compensation Law 72.31 at 14-125 (1982). The subsequent reversal of *Musick, supra* by *Colon Nunez v. Horn-Linie*, 423 F.2d 952 (1st Cir. 1970) was described by Larsen as a "morsel of xeonophobia" and "less than convincing".

It was also strongly critized by the Puerto Rico Supreme Court in a subsequent decision, *Lugo Sanchez v. Puerto Rico Water Resources Auth.*, 105 P.R.R. 850 (1977), which effectively reinstated the rule of *Musick*. Thus we adopt for the Virgin Islands the present interpretation by the courts of Puerto Rico of the statute largely identical to our own.

Having found the borrowed employee doctrine applicable to the Virgin Islands, we must decide whether it applies on the facts in this case, and whether, if it does, the complaint must be dismissed.

IV. APPLICABILITY TO VANTERPOOL

[12] At the outset, we discuss the applicability of the borrowed employee doctrine to the case at bar in the context of whether summary judgment is the appropriate vehicle for such a determination. The question of employment in a workmen's compensation matter is a fact question usually left for the jury. *Valo v. Monessen Southwestern Ry. Co.*, 407 F.2d 1400, 1402 (3d Cir. 1969).

In *Tarboro, supra*, at 943, the Third Circuit emphasized:

> While each case "must be decided on its peculair facts and ordinarily no one feature of the relationship is determinative", and the question of employment "contains factual elements such as to make it one for the jury . . .", the question may be taken from the jury "if reasonable men could not reach differing conclusions on the issue."
>
> *citing Baker v. Texas & Pacific Ry. Co.*, 359 U.S. 227, 228, 79 S. Ct. 664, 665, 3 L.Ed. 2d 756 (1959).

[13] Vanterpool strongly suggests there is a dispute over the facts. Despite his signing of the "Rehire Form", he states that he wore Litwin-issued clothing and safety equipment, and his work was directed by a fellow Litwin employee, with "infrequent" instructions from HOVIC supervisors. He does not, however, withdraw his own statement in his complaint that his work was done "according to the instructions" of HOVIC.

We do not see Vanterpool's assertions as in dispute with those of HOVIC in this regard. He does not claim that Litwin supervised his activities. Clearly, HOVIC can exercise control and supervision over Vanterpool at the same time he receives routine directions from a fellow Litwin employee, who is a pipefitter. There is no contradiction of the affidavit of Irwin L. Ramsey of HOVIC, who stated that he was Vanterpool's foreman and that he, as foreman, had "actual control of all the details of Vanterpool's work".

Thus, even if he took routine direction as an unskilled laborer from a Litwin pipefitter, there is no factual question at all that Vanterpool was supervised and controlled by HOVIC. There is also no dispute that HOVIC defined the work to be performed for it pursuant to the Litwin-HOVIC agreement. Likewise, there is no dispute that Vanterpool used HOVIC equipment to perform his work, even though he might have been issued standard safety gear from Litwin.

Having signed the "Rehire Form", there could have been no doubt that Vanterpool knew he would be working as a "HESS Turnaround Loanee".

Therefore, all of the elements of the borrowed employee doctrine are factually present except one . . . but that is an essential element. Vanterpool swore in his affidavit that he never gave his consent to be an employee of HOVIC in the knowing sense. He stated: "I was never informed that by working at HOVIC I would lose my right to sue HOVIC in the event that I was injured through the negligence of HOVIC, its employees or agents."

The HOVIC response to this is to cite Vanterpool's long history as a "HESS Turnaround Loanee", from 1976 to November, 1981. HOVIC suggests that over such a time he could not help but be aware of every aspect of his employment situation, but even HOVIC must acknowledge that for all that *was* contained in the "Rehire Form" signed by Vanterpool, there *was no* statement bringing his attention to a potential waiver of third party common law rights.

We cannot find the presence of knowing consent and full acquiescence required by *Standard Oil, supra*, to be an undisputed fact in the case herein. We agree that there are cases which hold that a worker such as Vanterpool, after working for a lengthy period of years for the special employer, can be presumed to have evaluated his full employment situation and have become aware of its conditions. *See, e.g., Gaudet, supra*, at 357. (Worker under special employer's control for more than 14 years).

The fact of intermittent employment such as Vanterpool experienced with Litwin at HOVIC from July, 1976 to November, 1981, cannot be said to be of such a lengthy period as to unquestionably attribute such awareness to him. That must be left for a jury to decide.

Therefore, even with all the other elements of the borrowed employee doctrine established without material factual dispute, we hark to the language cited earlier from Larsen, that the employee must give his knowing and informed consent before that doctrine can be invoked against him in a workmen's compensation setting.

To this Court, informed acquiescence is the *sine qua non* among the factors which must be present for application of the borrowed employee doctrine against Vanterpool. Since that issue is a material fact in dispute, we cannot at this stage invoke it either against Vanterpool or in favor of HOVIC.

CONCLUSION

We find that the borrowed employee doctrine does apply in the Virgin Islands. However, because a material fact is in dispute in this case, the matter will be left for jury determination. The motion for summary judgment will be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3506

GEORGE N. VANTERPOOL
MARJORIE VANTERPOOL, his wife

vs.

HESS OIL V.I. CORP.,

Appellant

On Appeal from the District Court
of the Virgin Islands
Division of St. Croix
Christiansted Jurisdiction
D.C. Civil No. 84-0341

Present: GARTH, BECKER and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel February 7, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered June 7, 1984, and certified to this Court by order entered June 15, 1985, be, and the same is hereby affirmed insofar as it holds that the borrowed employee doctrine applies in the Virgin Islands. It is further ordered and adjudged that the order of the said District Court is reversed insofar as it holds that a borrowed employee's knowing and intelligent waiver of his common law right to sue must be shown.

It is further ordered and adjudged that this Court having reversed the order of the said District Court this cause is remanded to the said District Court with direction to enter judgment in favor of HOVIC because as a matter of law, HOVIC is to be deemed Vanterpool's statutory employer against whom an action for negligence is barred. Costs taxed against appellees.

ATTEST:

Clerk

June 28, 1985

Certified as a true copy and issued in lieu
of a formal mandate on August 20, 1985.

Test:

Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1506

GEORGE N. VANTERPOOL
MARJORIE VANTERPOOL, his wife

vs.

HESS OIL V.I. CORP.,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, CHUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and ROSENN, *Senior Circuit Judge*

The petition for rehearing filed by appellees, George N. Vanterpool and Marjorie Vanterpool, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

DATED: AUG. 12, 1985

Circuit Judge

APPENDIX E

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GEORGE N. VANTERPOOL and MARJORIE VANTERPOOL, his wife, Plaintiffs	)	
vs.	)	CIVIL NO. 1983/ 341
HESS OIL VIRGIN ISLANDS CORPORATION, Defendant	)	

ORDER

THIS MATTER is before the Court on motion of the defendant for certification of an interlocutory order for appeal pursuant to 28 U.S.C. 1292(b). Having considered the motion, the Court is of the opinion that the order denying summary judgment on defendant's motion involves a controlling question of law in this jurisdiction as to which there is substantial grounds for difference of opinion. In this Court's view, an immediate appeal from the June 7, 1984 order will materially advance the ultimate determination of the above captioned case. It is also noted that the issue of the borrowed employee doctrine has come up repeatedly in this jurisdiction. The premises considered, now therefore it is

ORDERED:

THAT defendant's motion for certification of an interlocutory appeal is GRANTED; and

THAT this matter is hereby STAYED in all regards pending its return to this Court's jurisdiction through either the Third Circuit Court of Appeal's denial of permission for an interlocutory appeal or ultimate determination on the issues presented; and

THAT the controlling question of law presented for appeal be:

> Does the borrowed employee doctrine apply in the Virgin Islands, and if so, in a workmen's compensation setting, does the consent of the employee to control of his work by the special employer require the knowing waiver of his common law rights against that special employer?

DATED this day of June, 1984.

ENTER:

DAVID V. O'BRIEN
U.S. DISTRICT JUDGE

ATTEST: Geoffrey Barnard
Clerk

by: _____
Deputy